



STATEMENT BY

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UNITED STATES SENATE

OVERSIGHT HEARING ON THE
NATIONAL INDIAN GAMING COMMISSION

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Good morning Mr. Chairman and distinguished members of the Committee on Indian Affairs, my name is Brian Patterson, and I am the President of the United South and Eastern tribes, Inc. (“USET”). I am also an enrolled member of the Oneida Indian Nation, where I serve on the Nation’s Council as a Bear Clan Representative. Thank you for the opportunity to testify before the Committee on our experiences with the National Indian Gaming Commission (“Commission” or “NIGC”).

United South and Eastern Tribes, Inc. is a non-profit, inter-tribal organization that collectively represents its member tribes at the regional and national levels. USET represents twenty-five federally recognized tribes.¹

Included among the members of USET are some of the largest gaming tribes in the United States. We also represent tribes with more modest gaming facilities, as well as tribes that currently do not engage in gaming.

Congress enacted IGRA “to promote tribal economic development, tribal self-sufficiency, and strong tribal government.”² The Act, for the most part, has accomplished those goals. Indian gaming has been described as “the only federal Indian economic initiative that ever worked.” That is absolutely correct. Indian gaming has served as a critical economic tool to enable Indian nations to once again provide essential governmental services to their members, re-assert their sovereignty, and promote the goals of self-determination and self-sufficiency.

Prior to the advent of Indian gaming, many Indian nations, while legally recognized as sovereign governments, were not able to provide basic, governmental services to their people. They had all of the legal attributes of sovereign nations, but many did not have the practical ability to be an effective government for their members. Consequently, despite a strong and proud tradition, Indian nations languished in a two hundred year cycle of poverty.

¹ Members of the United South and Eastern Tribes, Inc., include: Eastern Band of Cherokee, Mississippi Band of Choctaw, Miccosukee Tribe, Seminole Tribe of Florida, the Chitimacha Tribe of Louisiana, the Seneca Nation of Indians, the Coushatta Tribe of Louisiana, the St. Regis Band of Mohawk Indians, Penobscot Indian Nation, the Passamaquoddy Tribe Indian Township, the Passamaquoddy Pleasant Point, the Houlton Band of Maliseet Indians, the Tunica-Biloxi Indians of Louisiana, the Poarch Band of Creek Indians, the Narragansett Indian Tribe, the Mashantucket Pequot Tribe, the Wampanoag Tribe of Gay Head (Aquinnah), the Alabama-Coushatta Tribe of Texas, the Oneida Indian Nation, the Aroostook Band of Micmac Indians, the Catawba Indian Nation, the Jena Band of Choctaw Indians, the Mohegan Tribe of Connecticut, the Cayuga Nation, and the Mashpee Wampanoag Tribe.

² 25 U.S.C. §2701(4)

Today, the resources of Indian gaming operations are used to provide essential governmental services to tribal members. Indian nations across the country are using gaming revenues to invest in dozens of tribal member programs, including home ownership initiatives, tuition assistance for everything from elementary schools to post-doctorate work, health insurance for all tribal members, and access to top-notch health clinics.

We cannot calculate the intangible benefits of the impact such economic development has created, including the impact on the most important matter for an Indian nation – its human resources. Suffice it to say that in many situations, Indian governments have seen their members move from unemployment rolls to being gainfully employed.

Reclaiming a past heritage also has been a priority for all USET members, and gaming proceeds have enabled Indian nations to make tremendous gains in this area. In many respects, these individual efforts culminated collectively in the dedication of the National Museum of the American Indian in September 2004. I am proud to note that the three largest contributions to the building of this tremendous institution came from Indian nations that are Members of USET.³ I want to thank the Committee for its leadership in making this museum a reality, and in particular, Senator Inouye for his vision and dedication to ensuring that the museum would meet the expectations of Indian people.

While for the most part, the relationship of our member tribes with the NIGC works well and is positive, there is one very important area in which USET member Tribes feel the NIGC has failed to meet its responsibilities to Indian Country, and our tribes are disproportionately affected by this failure far more than other areas of the Country. I am here today to discuss both the negative and positive aspects of our members' relationship with the NIGC.

Working Toward a Common Goal

The National Indian Gaming Commission and the United Southern and Eastern Tribes, Inc., share the common goal of ensuring that Indian gaming operated by the USET Tribes is operated fairly and in a manner which benefits and protects the Tribes' interests. We believe that the Tribes and the NIGC have been able to establish a relationship that assists both parties in meeting their goals.

There are several areas in which we have been able to establish positive relationships.

1. Working together to identify problem areas.

Our member tribes have been able to work collaboratively with the NIGC to identify areas in which the Tribes could improve their regulation before they become problematic.

³ Jim Adams, *Leaders guide museum with humble yet historic partnership*, Indian Country Today (Lakota Times), Sept. 22, 2004, at 1.

It can be helpful to engage the assistance of the NIGC, even though Tribes are quite effective at resolving the vast majority of these issues without such assistance.

2. Voluntarily working with NIGC to conduct on-site reviews of their class III gaming operations.

Despite the holding in the *Colorado River Indian Tribe v. National Indian Gaming Commission* (“CRIT”), several of our member tribes have continued to work with the NIGC to ensure that their operations meet minimum internal control standards. Many tribes, since the CRIT decision was issued, have voluntarily continued to follow the Minimum Internal Control Standards set in place by the NIGC prior to the decision.

The NIGC has assisted more than one of our member Tribes with on-site visits to assess voluntary compliance with those MICS standards.

3. Working with tribes who have applied for Secretarial Procedures.

A number of our member Tribes are located in states which allow class III gaming as a matter of State law, but the States refuse to negotiate with the tribes for class III gaming compacts. These tribes are left to operate class II gaming and seek Secretarial Procedures.

The NIGC has been helpful in providing these tribes with technical assistance in the operation of class II gaming, and offering support and assistance with developing the regulatory framework necessary for Secretarial Procedures to move forward. In at least one instance, the NIGC has offered to provide class III regulatory services to the Tribe seeking procedures.

4. Providing on-site training and review.

The NIGC has also provided on-site training to a number of our member Tribes, which provides them with invaluable technical assistance they need to develop and improve their new or existing regulatory systems. They are also available and have provided on-site reviews to assess the adequacy of existing systems in place, and provide advice on how to improve those systems, preventing problems before they can happen.

When Relationships Break Down

As I mentioned above, there is one very important situation in which we believe the NIGC has failed to meet its responsibilities to those Tribes who are only able to operate class II gaming.

For the member Tribes of USET who find themselves in this situation, their state’s regulatory scheme would in fact allow them to operate class III gaming. However, for these Tribes, their respective state has refused to negotiate a class III compact with the Tribe. These Tribes are therefore left to operate class II games, and apply to the

Department of Interior for class III gaming procedures, a process which takes years to navigate. In the case of one of our member Tribes, this process of receiving class III gaming took sixteen years (16) to resolve and is still not complete.

Thus, the regulation of class II gaming is vital to many of our member Tribes, especially those located in Florida, Alabama, Louisiana and Texas. Consequently, USET member tribes follow the NIGC's regulatory efforts in the area of class II gaming with great interest.⁴

In the past several years, the NIGC has attempted to modify the regulatory structure surrounding class II gaming in a number of ways, beginning in 2003 with the formation of a Tribal Advisory Committee charged with creating a "bright line" between class II and class III gaming. These efforts led to the NIGC's publication of Game Classification Standards and amendments to its definition of electromechanical facsimile on May 26, 2006, as well as proposed Class II Technical Standards on August 11, 2006. Tribes overwhelmingly opposed these draft regulations, a position that was driven home during a hearing held on September 19, 2006. Most Tribes stated that the new standards would impose an unwieldy and unworkable system of rules on class II operators, and would cause severe economic harm to Indian tribes who operate class II games. And tribes were not alone in their opposition of these regulations: gaming manufacturers also opposed the NIGC's regulations.

In the wake of this hearing, the NIGC held a follow-up meeting in December of 2006 with what is now termed the "Tribal Gaming Working Group." This Working Group consists of Tribal Leaders, technical and legal experts, and members of the NIGC's Tribal Advisory Committee on class II gaming ("TAC"), which itself is made up of Tribal representatives and class II technical experts. During this follow-up meeting, the draft regulations were discussed, and it was agreed that the Working Group would develop a more suitable set of class II Technical Standards. Less than two months later, on January 25, 2007, this group provided a revised draft of the Class II Technical Standards to the NIGC for review and consideration. Now understanding that they were looking at class II gaming incorrectly, and that they needed to look at class II gaming more systematically, the NIGC withdrew all pending class II regulations on February 15, 2007.

The NIGC, in conjunction with the Tribal Gaming Working Group, then embarked on an extensive effort to revise the NIGC's Minimum Internal Control Standards ("MICS") so that they conformed to the Technical Standards, as revised. The Working Group also made additional conforming changes to the already revised Technical Standards to ensure that when taken as a whole, the overall package was consistent.

⁴ In addition, the regulation of class II gaming is important even to those tribes who operate pursuant to class III compacts because in many instances the terms of the compact expire. There is no guarantee that a state with a new governor and legislature will negotiate in good faith over a new compact.

The work product from this extensive effort was submitted to the NIGC on September 12, 2007. On October 24, 2007, the NIGC published four new sets of proposed regulations addressing the Facsimile Definition, Game Classification Standards, the MICS and the Class II Technical Standards. Much to our dismay, however, our member tribes who participated in this process were completely shocked to find that significant and material changes had been made by the NIGC to the collaborative September 2007 drafts.

Overall, USET Tribes generally believe that the NIGC has not listened to their comments, nor have they acknowledged the current state of the law. Our member Tribes also are concerned with the appearance that the NIGC simply went through the motions of “consultation” by holding meetings with tribal leaders and representatives when in fact, they had no intention of attempting to reach a consensus or even making meaningful concessions regarding the substance of the draft regulations.

Perhaps most disturbing, our members Tribes are concerned that the NIGC has not heeded Tribal concerns regarding the devastating impacts that these proposals will have on the Tribal gaming industry. The NIGC’s own economic impact study estimates that the draft class II regulations will cost the tribal gaming industry over \$1.2 billion a year.

At the end of the day, USET Tribes are concerned that the NIGC has been set on a specific outcome with regard to the adoption of the proposed regulations pertaining to Class II gaming, and that this orientation to a specific outcome has skewed the rulemaking process. They also feel that, despite their best efforts to deal with the NIGC fairly on these issues, they have not received the same treatment in return.

I have attached copies of our member Tribes comments regarding the proposed gaming classification regulation for your information, because I feel the information contained in them is important and too detailed to be properly addressed by my brief testimony.

Governmental Performance and Results Act

One additional area in which we would like to comment is that of governmental planning and performance. Until very recently, the National Indian Gaming Commission was not required to take part in the standard strategic planning and performance assessment in which other agencies are required to participate.

This changed very recently, with the adoption of Public Law 109-221, which subjected the NIGC to the requirements of the *Government Performance and Results Act of 1993* (Public Law 103-62) (“GPRA”) and additionally required the NIGC to provide a plan for technical assistance to tribal gaming operations in accordance with GPRA.

We believe that the application of GPRA to the NIGC is a positive step toward making the Commission more transparent and accountable to the public and particularly

to Indian Country. We are also encouraged by the development of the draft GPRA plan proposed by the NIGC is a move in the right direction, and we look forward to an ongoing consultation and dialogue with the NIGC on their future plans before the report is finalized.

Conclusion

As you can see, the relationship between the diverse tribes who make up the United South and Eastern Tribes and the Commission is complicated. Overall, our member tribes feel that the relationship between tribes and the NIGC is positive. We acknowledge Chairman Hogen's support of Indian tribes over many years and in many different roles. But we also believe that NIGC has failed in one very significant respect, with its unyielding move toward reworking class II gaming regulation.

The failure of the NIGC to properly consult with tribes regarding its class II rulemaking efforts has left our member Tribes frustrated. However, if afforded the opportunity, we are committed to continuing to work with Congress and the NIGC on the class II gaming issues. A lot of hard work already has been done to develop consensus positions on many of the class II issues. This provides a good place for us to re-engage with the federal government in establishing meaningful dialogue to reach to an acceptable outcome for Indian nations.

Thank you, Mr. Chairman, for the opportunity to testify today.